



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

July 1, 2003

Mr. Leonard Schneider  
Ross, Banks, May, Cron & Cavin, P.C.  
2 Riverway, Suite 700  
Houston, Texas 77056-1918

OR2003-4497

Dear Mr. Schneider:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 183536.

The Rosenberg Police Department (the "Department"), which you represent, received a request for information concerning an investigation of a specified automobile accident and involving a named officer. The request for information encompasses transcripts, reports, statements, notes, photos, other tangible materials, radio and telephone communications, other reports related to incidents occurring at the Rosenberg City Jail, and the named officer's personnel file. You inform us that the Department has released a redacted version of most of the information contained in the officer's personnel file. Additionally, you advise us that the Department will release two responsive cassette tapes to the requestor. You assert portions of the remaining responsive information are excepted from disclosure under sections 552.101, 552.103, 552.111, 552.114, 552.115, 552.117, 552.119, 552.130, and 552.137 of the Government Code. We reviewed the information you submitted and considered the exceptions you claim.

First, we address the Department's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. You inform us that the Department received the present request for information on April 15, 2003. Thus, the Department should have claimed all applicable exceptions no later than April 29, 2003. Though you assert some exceptions in

your first letter to this office in which you request an attorney general opinion, in your letter dated April 30, 2003, you assert additional exceptions to required public disclosure. Consequently, we conclude the Department failed to comply with the requirements of sections 552.301(b) of the Government Code because the additional exceptions were not asserted timely.

According to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest exists when some other source of law makes the information confidential or third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As sections 552.114, 552.119, and 552.137 of the Government Code provide compelling reasons to overcome the presumption of openness, we will address your arguments under these exceptions. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that the information is made confidential by another source of law or affects third party interests).

Second, we note the submitted information contains an accident report form, ST-3, governed by chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Transp. Code § 550.065(c)(4). This provision requires the Department of Public Safety or another governmental entity to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In this instance, the requestor has provided the Department with all three requisite pieces of information. Therefore, the Department must release the ST-3 accident report, which we have marked, in its entirety, to the requestor in accordance with section 550.065(c)(4) of the Transportation Code.

Third, we address your claims under section 552.101 of the Government Code, which excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the doctrine of common-law privacy and information made confidential by other statutes.

Common-law privacy protects information when (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the information. *Indus. Found. v. Tex.*

*Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, however, the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage that is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. See Open Records Decision No. 600 (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). In addition, information related to an individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common-law right to privacy. See Open Records Decision Nos. 545, 523 (1989). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. See Open Records Decision No. 600 at 10.

In this instance, document numbers 000034, 000035, 000036, and 000064 contain personal financial information protected by common-law privacy. Therefore, the Department must withhold the information we have marked under section 552.101 of the Government Code. For information relating to health and dental plans, the Department must withhold such information as private only if these are optional plans offered by the Department.

Next, section 6103(a) of title 26 of the United States Code makes federal tax return information confidential. See 26 U.S.C. § 6103(a). The term "return information" includes "the nature, source, or amount of income" of a taxpayer. See 26 U.S.C. § 6103(b)(2). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Our office has specifically held that a governmental body must withhold Form W-4 in its entirety. Open Records Decision No. 600 at 9 (1992). Therefore, the Department must withhold the submitted Form W-4 from disclosure.

Also, the Department asserts federal regulations prohibit the release of criminal history report information ("CHRI") maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department

of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). The submitted information does not fall within the purview of section 411.083. Further, we determine the information you seek to withhold in document numbers 000062, 000063, 000070, and 000071 does not constitute criminal history information *compiled* by the Department. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (finding criminal history information compiled by FBI protected from disclosure under Freedom Of Information Act by privacy interest). Rather, the officer at issue provided this information as part of the application process. Accordingly, the Department may not withhold document numbers 000062, 000063, 000070, and 000071 under section 552.101 of the Government Code.

Additionally, we note document numbers 000001 and 000006 contain a social security number that may be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in the records at issue is confidential under section 405(c)(2)(C)(viii)(I), and therefore, excepted from public disclosure under section 552.101 of the Government Code and the referenced federal provision. However, we caution the Department that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, you should ensure that no such information was obtained or is maintained by the Department pursuant to any provision of law enacted on or after October 1, 1990.

Fourth, you claim section 552.103 of the Government Code excepts document numbers 000007 through 000011. Section 552.103 states the following, in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure

under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). To secure the protection of section 552.103(a), the Department must demonstrate the requested information "relates" to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991). The Department has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing the applicability of section 552.103(a) requires a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information or investigates the circumstances surrounding a potential claim does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You do not state that the attorney has made a specific threat to sue. Furthermore, you do not make any other representations to this office regarding the nature or existence of reasonably anticipated litigation. Rather, you state that the "requestor has made claims against the City regarding the vehicle accident and this is sufficient to show that litigation is reasonably anticipated." Additionally, you explain that the "requestor confirms the reasonable anticipation of litigation by his language in the request '*This request in necessitate [sic] by TML's/Mission Adjusting and Risk Management, LLP failure to accept liability for the accident involving [the named officer] . . . .*'" Thus, while the letter requesting information shows that a complainant has hired a lawyer who is investigating the merits of a claim, this is insufficient to meet the first prong of section 552.103. *See* Open Records Decision No. 361. Therefore, based on our review of your arguments and the submitted information, we conclude the Department has not met its burden of establishing that litigation was reasonably anticipated on the date the Department received the present request. Accordingly, the Department may not withhold document numbers 000007 through 000011 under section 552.103 of the Government Code.

Fifth, you contend section 552.111 of the Government Code excepts document numbers 000007 through 000011. This provision excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 generally does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

You state the documents at issue concern agency policy regarding vehicle response to emergency calls and reflect the deliberative process. However, after reviewing the documents, we find the information does not implicate the policymaking functions of the Department. Rather, the information relates to a personnel matter involving a single officer. Therefore, the Department may not withhold document numbers 000007 through 000011 under section 552.111 of the Government Code.

Sixth, you seek to withhold document number 000022 under section 552.114 of the Government Code, which excepts from disclosure student records "at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a) (emphasis added). Here, the Department maintains the information at issue, not an educational institution. Therefore, as section 552.114 does not apply to the information, the Department may not withhold document number 000022 under this provision.

Seventh, you contend section 552.115 of the Government Code excepts document number 000032 from disclosure. Section 552.115 provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that "a birth record is public information and available to the public on and after the 50th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official." See Gov't Code § 552.115. However, as section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or local registration official, the Department may not withhold the certification of birth under this provision. See Gov't Code § 552.115; Open Records Decision No. 338 (1982).

Eighth, we note the Department may rely on Open Records Decision No. 670 (2001) as a previous determination issued by this office to withhold the officer's home and personal cellular phone numbers, personal pager number, home address, social security number, and information that reveals whether the officer has family members. *See* Open Records Decision No. 670 (2001). Nevertheless, as you have submitted information for our review, we also address your assertion of section 552.117(2) of the Government Code. Section 552.117(2) excepts from public disclosure information that reveals a peace officer's home address, home telephone number, social security number, and whether the officer has family members. "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure. Under section 552.117(2), a governmental body must withhold the officer's *former* home addresses and telephone information from disclosure. *See* Open Records Decision No. 622 (1994). Thus, the Department must withhold the information you have highlighted under section 552.117(2). We have marked additional information the Department must withhold under this provision.

Ninth, we note the submitted documents contain information subject to section 552.1175 of the Government Code. In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature recently amended section 552.1175 of the Government Code. As amended, section 552.1175 states the following, in pertinent part:

(a) This section applies only to:

(3) current or former employees of the Texas Department of Criminal Justice ["TDCJ"] or of the predecessor in function of the department or any division of the department[.]

....

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Act of May 30, 2003, 78<sup>th</sup> Leg., R.S., S.B. 1388, § 2 (current version at Gov't Code § 552.1175(a)(3), (b)). You do not inform this office, nor does any of the submitted information indicate, whether the TDCJ employee elected confidentiality for information

about himself in accordance with subsections 552.1175(b)(1) and (2). If this individual has elected confidentiality under section 552.1175, then the Department must redact the information we have marked in document number 000053 in accordance with section 552.1175.

Tenth, you argue the submitted documents contain information excepted from disclosure by section 552.130 of the Government Code. Section 552.130 excepts from public disclosure information relating to a driver's license or a motor vehicle title or registration issued by an agency of this state. The information subject to release contains a copy of a driver's license, driver's license numbers, a license plate number and an expiration date, and license class types. Therefore, the Department must withhold all motor vehicle record information in the remaining documents at issue. Thus, we concur with your redactions and we have marked additional information the Department must withhold under section 552.130 of the Government Code.<sup>1</sup>

Finally, as you note, the submitted information contains an e-mail address subject to section 552.137 of the Government Code. Specifically, section 552.137 states the following:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. This provision makes certain e-mail addresses confidential. *See* Gov't Code § 552.137. You do not inform us that the member of the public has affirmatively consented to the release of the e-mail address contained in document number 000055. Therefore, the Department must withhold the e-mail address of the member of the public, which you have marked, under section 552.137 of the Government Code.

In summary, the Department must release the ST-3 accident form, in its entirety, in accordance with section 550.065(c)(4) of the Transportation Code. The Department must withhold the following information under section 552.101 of the Government Code and the stated statute or judicial decision: 1) the personal financial information, which we have marked under common-law privacy, 2) Form W-4 under section 6103(a) of title 26 of the United States Code, and 3) if applicable, the social security number we have marked under the 1990 amendments to the Social Security Act. From all information subject to release, the Department must withhold the officer's and, if applicable, the TDCJ employee's personal

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<sup>1</sup> With respect to document number 000021, section 552.130 is dispositive; therefore, we need not address your claim under section 552.119 of the Government Code.



information under sections 552.117(2) and 552.1175 of the Government Code as well as all motor vehicle records information under section 552.130 of the Government Code. In addition to your highlighted redactions, we have marked information the Department must withhold under these provisions. Last, the Department must withhold the e-mail address you have marked pursuant to section 552.137 of the Government Code. The Department must release the remainder of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Christen Sorrell". The signature is fluid and cursive, with the first name "Christen" written in a larger, more prominent script than the last name "Sorrell".

Christen Sorrell  
Assistant Attorney General  
Open Records Division

CHS/seg

Ref: ID# 183536

Enc: Submitted documents

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